

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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|------------------------------------|---|-------------------------------|
| DAISY HEMINGER |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket Nos. 172,884 & 186,604 |
| THE BOEING CO. - WICHITA |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| AETNA CASUALTY & SURETY |) | |
| Insurance Carrier |) | |
| AND |) | |
| |) | |
| WORKERS COMPENSATION FUND |) | |

ORDER

Both the Kansas Workers Compensation Fund and claimant appealed from the Award entered by Administrative Law Judge John D. Clark dated February 5, 1996. The Appeals Board heard oral argument on June 4, 1996.

APPEARANCES

Michael L. Snider of Wichita, Kansas, appeared on behalf of claimant. Eric K. Kuhn of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier. The Kansas Workers Compensation Fund appeared by its attorney, Scott J. Mann of Hutchinson, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has adopted the stipulations listed in the Award. The Appeals Board has reviewed and considered the record listed in the Award.

ISSUES**Docket No. 172,884**

Docket No. 172,884 involves injury to claimant's left and right upper extremities. The Administrative Law Judge treated the upper extremity injuries as one general body injury. He also found that the injury would not have occurred but for a preexisting handicap and assessed 100 percent of the award against the Kansas Workers Compensation Fund. On appeal the parties asked for review of the following issues:

- (1) Nature and extent of claimant's disability.
- (2) Extent of the Fund liability, if any.

The claimant argues that her bilateral upper extremity injuries resulted in work restrictions and, after a subsequent layoff, claimant is entitled to work disability. The Fund, on the other hand, argues that there were two separate upper extremity injuries and the Fund should be liable only for the second injury. In the alternative, the Fund argues it has no liability. Both the Fund and respondent argue that the award for the upper extremity injuries should be limited to a functional impairment.

Docket No. 186,604

In Docket No. 186,604, a claim for injury to claimant's right knee, the Fund and respondent argue that the award should be reduced. According to both, the injury occurred after July 1, 1993, and the award should have deducted the amount of any preexisting functional impairment, in accordance with K.S.A. 44-501. The nature and extent of the disability is the only issue raised.

FINDINGS OF FACT AND CONCLUSIONS OF LAW**Docket No. 172,884**

After reviewing the record and considering the arguments, the Appeals Board concludes that the Award should be modified. In Docket No. 172, 884 claimant should be awarded benefits for a general body disability with a date of accident of September 21, 1992, and claimant is entitled to benefits based on an 8 percent functional impairment from September 21, 1992, until March 28, 1995, the date of layoff, and a 52 percent work disability thereafter.

The Board finds that the injuries to claimant's upper extremities occurred in part simultaneously and over an extended period of time. They do not logically separate into distinct injuries. The Board has therefore concluded the injuries to the bilateral upper extremities should be treated as an injury to the body as a whole and as one injury.

Claimant testified at the regular hearing that in June 1990 she began having problems with her hands. The problems at that time were with her left hand and she underwent surgery for de Quervain's and a ganglion cyst on December 17, 1990. Claimant testified that she was doing continuous drilling and riveting during that period. She also testified that she had, in August of 1989, slipped with the rivet gun and hit her left hand.

The evidence also establishes that prior to the injury to claimant's left hand, she began having problems with her right upper extremity. She was first seen at Boeing Central Medical for upper extremity complaints on October 7, 1988. At that time she was diagnosed with tendonitis in the right wrist and was off work approximately one week. The records indicate respondent intended to file a Form 88 at that time but for unexplained reasons none was filed. The next visit occurred August 28, 1989, when claimant's rivet gun hit her left hand. She did not return to Boeing Central Medical again until December 1990. At that time she gave a complaint of symptoms to her left hand with an onset of June 1990. She also gave the history of injury to the left hand after it was struck by the rivet gun.

After surgery in December 1990, claimant returned to work on January 28, 1991. At claimant's request, Dr. Lesko gave no restrictions and claimant returned to the same type of work. Dr. Lesko released her from his care on March 15, 1991. Claimant testified she thereafter began having additional problems on her right upper extremity and she was again referred to and saw Dr. Lesko on August 10, 1992, for problems with her right hand and wrist. At this time Dr. Lesko diagnosed de Quervain's on the right. He prescribed anti-inflammatory medications and physical therapy. He did not recommend surgery and last saw claimant September 21, 1992, for symptoms to her right upper extremity.

The Appeals Board does not consider the incident when the rivet gun struck claimant to warrant treatment as a separate injury. Claimant did visit Boeing Central Medical following that incident. However, the symptoms apparently gradually became worse through her work activities until December 1990, almost a year-and-a-half later, when she underwent surgery. It seems clear from the record that it was a combination of the initial blow, together with the repetitive work activities thereafter, that resulted in the final functional impairment. It also seems clear that claimant was developing the injury to the right upper extremity at the same time the left was developing.

The Appeals Board concludes that claimant's bilateral upper extremity should be treated as one accidental injury to the body as a whole. Claimant suffered simultaneous injury to both upper extremities. This case is analogous to Murphy v. IBP, Inc., 240 Kan. 141, 727 P.2d 468 (1986). The court there awarded general body disability noting that the aggravation to claimant's hands and arms was simultaneous even though the injuries did not manifest themselves simultaneously. The court specifically held:

"We hold that where a claimant's hands and arms are simultaneously aggravated, resulting in work-related injuries to both hands and arms, the injury is compensable as a percentage of disability to the body as a whole under K.S.A. 44-510e."

Two physicians gave testimony regarding the nature and extent of claimant's disability. Dr. Blaty rated claimant's impairment as 5 percent to the right upper extremity and 8 percent to the left upper extremity. He combined these to arrive at a rating of 8 percent to the body as a whole. Dr. Lesko rated the left upper extremity as 7 to 8 percent and the right upper extremity as a 2 to 3 percent impairment. He also combined these to arrive at an 8 percent permanent partial impairment to the body as a whole. Based upon these two medical opinions, the Appeals Board concludes that claimant's functional impairment was 8 percent to the body as a whole.

The Appeals Board finds that claimant sustained an 8 percent permanent partial general body disability as of September 21, 1992, the date claimant was released from treatment to the right upper extremity. Although work restrictions were ultimately recommended, claimant returned to work at a comparable wage and continued to work at a comparable wage until the layoff on March 28, 1995. Claimant is entitled to functional impairment benefits based upon the 8 percent functional impairment until March 1995. As of March 28, 1995, claimant would be entitled to work disability. Lee v. Boeing Co., 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

The record includes evidence relating to the loss of access to the open labor market and loss of ability to earn a comparable wage, specifically the opinions of Ms. Karen Terrill and Mr. James Molski. Both based their opinions upon the restrictions recommended by Dr. Blaty. Dr. Blaty separated the restrictions for the bilateral upper extremity injury from restriction for injury to the knee. Dr. Blaty recommended restrictions of limited gripping and squeezing activities. He also recommended that she not lift more than 25 pounds based upon the limited gripping and squeezing restrictions. Mr. Molski indicated claimant would have a loss of access of 40-45 percent. Using the same restrictions, Ms. Terrill testified claimant's loss of access to the labor market would be 38 percent. Giving equal weight to these opinions, the Appeals Board concludes that claimant sustained a 40 percent loss of access to the open labor market. Ms. Terrill concludes claimant should be able to earn \$8-10 per hour post-injury while Mr. Molski expects post-injury earning ability to be \$5.50-6.50 per hour. Claimant's preinjury wage was stipulated to be \$819.91. Again, giving equal weight to the opinions, the Appeals Board finds that claimant sustained a 63.5 percent loss of ability to earn a comparable wage. Giving equal weight to the wage loss prong and the labor market loss, the Appeals Board concludes claimant sustained a 52 percent work disability as of the date of layoff, March 28, 1995.

Because this claim is treated as one single accident, there can be no Fund liability. As the Fund has argued, the Fund's liability under K.S.A. 44-567 is based upon the occurrence of an injury after knowledge of preexisting impairment which constitutes a handicap. There must be initial handicap followed by separate injury. Fund liability does not, for that reason, fit the circumstances presented here, and the Appeals Board finds that the Kansas Workers Compensation Fund has no liability for this claim. Lee v. Boeing Co., 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

Docket No. 186,604

Docket No. 186,604 relates to claimant's knee injury. The record establishes that claimant first suffered a knee injury in a nonwork-related accident. She tripped on a step in a bowling alley and fell on her knee. She underwent surgery to the knee and returned to work on February 22, 1993. One day after returning to work, claimant slipped and fell on ice in the company parking lot. She was taken off work again and released to return to work March 29, 1993. Upon her return she was given a new job, one which required her to climb ladders.

Respondent has argued that the date of accident should be post-July 1, 1993, and, because of an amendment to K.S.A. 44-501, respondent asserts the disability awarded should be reduced by the amount of preexisting impairment. The Appeals Board agrees. The evidence establishes that after claimant's return to work in March 1993, the knee condition continued to worsen from the work activities until surgery was required on November 23, 1993. Claimant was thereafter off work until released by Dr. Artz in March 1994.

Both Dr. Artz and Dr. Blaty give opinions regarding the extent of claimant's preexisting impairment. Dr. Blaty testified that 12 percent of the total 18 percent impairment was attributable to claimant's preexisting degenerative condition. Dr. Artz testified claimant has an additional 5 percent impairment as a result of her most recent work-related injury. Giving equal weight to these two opinions, claimant is entitled to a 5.5 percent permanent partial impairment of her left lower extremity and the award should be modified accordingly.

The modification in the Award includes a modification in the temporary total disability rate. The Appeals Board concludes November 23, 1993, should be treated as the date of accident. Respondent paid 29 weeks of temporary total disability for the period from November 23, 1993, the date of surgery, to June 13, 1994, the date claimant returned to work. The temporary total disability rate would, therefore, be \$313 per week.

AWARDDocket No. 172,884

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated February 5, 1996, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Daisy Heminger, and against the respondent, The Boeing Company - Wichita, and its insurance carrier, Aetna Casualty & Surety, for an accidental injury on September 21, 1992, and based upon an average weekly wage of \$819.91 for 6.57 weeks of temporary total disability compensation at the rate of \$299.00 per week, or \$1,964.43, followed by 124.57 weeks at the rate of \$43.73 per week, or \$5,447.45, for an 8% permanent partial general disability,

through March 28, 1995, followed by 283.86 weeks at \$284.25 per week, or \$80,687.21, for a 52% work disability, or a total award of \$88,099.09.

As of March 14, 1997, there is due and owing claimant 6.57 weeks of temporary total disability compensation at the rate of \$299 per week, or \$1,964.43, followed by 124.57 weeks of permanent partial compensation at the rate of \$43.73 per week, or \$5,447.45, and 102.43 weeks at \$284.25 per week, or \$29,115.73, for a total of \$36,527.61, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$51,571.48 is to be paid for 181.43 weeks at the rate of \$284.25 per week, until fully paid or further order of the Director.

Docket No. 186,604

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated February 5, 1996, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Daisy Heminger, and against the respondent, The Boeing Company - Wichita, and its insurance carrier, Aetna Casualty & Surety, for an accidental injury which occurred November 23, 1993, for 29 weeks of temporary total disability compensation at the rate of \$313 per week or \$9,077, followed by 9.41 weeks at the rate of \$313 per week, or \$2,945.33, for a 5.5% permanent partial disability to the leg, making a total award of \$12,022.33, all of which is immediately due and owing less amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of March 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael L. Snider, Wichita, KS
Eric K. Kuhn, Wichita, KS
Scott J. Mann, Hutchinson, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director